

City of Seattle, Decision 11588-A (PECB, 2013)

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SEATTLE CITY ATTORNEY

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS' GUILD,

Complainant,

vs.

CITY OF SEATTLE,

Respondent.

CASE 24026-U-11-6144

DECISION 11588-A - PECB

DECISION OF COMMISSION

Vick, Julius, McClure, P.S., by *Jeffrey Julius*, Attorney at Law, for the union.

Seattle City Attorney Peter S. Holmes, by *Paul A. Olsen*, Assistant City Attorney,
and *Jennifer K. Schubert*, Assistant City Attorney, for the employer.

On June 3, 2011, the Seattle Police Officers' Guild (union) filed an unfair labor practice complaint alleging that the City of Seattle (employer) unilaterally changed the false arrest insurance benefit by using in-house counsel, rather than retaining outside counsel, to represent bargaining unit employees in police action lawsuits, and by using a legal representation agreement as part of the representation by in-house counsel. The Unfair Labor Practice Manager reviewed the complaint and issued a preliminary ruling finding a cause of action existed for refusal to bargain in violation of RCW 41.56.140(4).

Examiner Emily H. Martin conducted a hearing and issued a decision.¹ The Examiner concluded that the decision to use in-house counsel was not a mandatory subject of bargaining and that the use of a legal representation agreement was not a mandatory subject of bargaining. The union appealed.

¹ *City of Seattle*, Decision 11588 (PECB, 2012).

ISSUES

1. Was the decision to use in-house counsel, rather than retain outside counsel, to represent bargaining unit employees in police action lawsuits a mandatory subject of bargaining?
2. Was the decision to use a legal representation agreement a mandatory subject of bargaining?

We affirm the Examiner. The decision to use in-house counsel, as opposed to outside counsel, to defend police action cases was not a mandatory subject of bargaining. The decision to use a legal representation agreement was not a mandatory subject of bargaining.

LEGAL PRINCIPLES

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). The determination as to when a duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1).

The Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. In deciding whether a duty to bargain exists, there are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, or working conditions of employees, and (2) the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. *Fire Fighters, Local Union 1052 v. Public Empl't Relations Commission*, 113 Wn.2d 197, 203 (1989) (*City of Richland*). The inquiry focuses on which characteristic predominates. *Id.* The Supreme Court in *City of Richland* held that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and

decisions that are predominately 'managerial prerogatives,' are classified as non-mandatory subjects." *Id.* at 200.

"[P]ersonnel matters, including wages, hours and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *City of Richland*, 113 Wn.2d at 200 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1997), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which parties may negotiate. *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997).

ANALYSIS

The union represents a bargaining unit of commissioned police officers through the rank of sergeant. Police officers may be subject to lawsuits arising from the course and scope of their employment. These "police action" lawsuits may be filed against the individual employee, the employer, and employer officials.

The employer and union have included Article 14, which addresses false arrest insurance, in their collective bargaining agreement since 1970. Beginning with the 1972-1974 collective bargaining agreement, Article 14 referenced an attached insurance policy. The 1973 insurance policy allowed the insurance company to assume the defense of a claim provided the attorney retained was approved by the insured and acceptable to the insurance company.

Under Article 14 of the collective bargaining agreement in effect through December 31, 2010, the employer "shall provide false arrest insurance either through self-insurance or an insurance policy which conforms to the policy" attached. The parties intended that the employer "provide no less benefits for false arrest insurance than currently enjoyed" by bargaining unit employees. Article 14.3 stated the employer "shall continue the current practice with respect to the use of in-house counsel for the tort defense of police officers." The employer contracted with the Stafford Frey Cooper law firm to defend police action (tort) cases.

On September 10, 2010, City Attorney Peter Holmes (Holmes) sent a letter to Union President Richard O'Neill (O'Neill). Holmes informed O'Neill that beginning January 1, 2011, the employer would end the practice of exclusively using outside counsel to defend tort claims brought against bargaining unit employees. The union demanded to bargain the decision and effects.

Recognizing that it would be unable to handle all of the police action defense cases in-house, the employer sought to hire outside counsel to perform some of the work. The employer invited the union to participate in the selection process. The union declined.

Use of In-house Counsel

In order to determine whether the decision to use in-house counsel, rather than retain outside counsel, to represent bargaining unit employees in police action lawsuits is a mandatory subject of bargaining, the balancing test will be applied. On one side of the balance is the impact of the change on employee wages, hours, and working conditions. The union asserted that the benefits of the false arrest insurance provides for representation by outside counsel, who is approved by the bargaining unit employee, and for the employer to pay the cost of representation of outside counsel. The union asserted that the false arrest insurance benefits were a form of wages and a mandatory subject of bargaining. The union asserted that employee wages or compensation may be impacted by an adverse judgment in a police action case because the employer is not required to indemnify employees for punitive damages. The union claimed employees would pay out of pocket expenses in police action lawsuits if they chose not to be represented by in-house counsel.

On the other side of the balance is the extent to which the change lies at the core of the employer's entrepreneurial control or is a management prerogative. The employer's reasons for changing who represents employees in police action lawsuits included: managing costs, providing direct oversight of litigation, increasing compliance with the city attorney's office philosophy and strategic decisions, improving the ability to provide training, and increased transparency. The employer sought to improve compliance with competitive bidding for outside counsel. The employer contracts with outside counsel to represent bargaining unit employees in the event a conflict of interest exists.

The identity of legal counsel representing employees in lawsuits is not a mandatory subject of bargaining. The employer's managerial prerogatives outweigh the potential impacts on employee wages. The employer did not refuse to bargain when it changed who represented bargaining unit employees in lawsuits.

Legal Representation Agreement

In May 2011, an in-house attorney began the process of defending a police officer. The attorney provided the officer with a legal representation agreement. The agreement sought permission to share some information with other defendants.

The legal representation agreement used to establish the attorney-client relationship is not a mandatory subject of bargaining. The employer's interest in complying with the developing case law outweighs any potential impact the legal representation agreement might have on employee wages, hours, or working conditions. Further, the unfair labor practice mechanism is not the proper forum to address concerns with the validity, scope, or form of the legal representation agreement.

CONCLUSION

The employer did not refuse to bargain when it changed from hiring outside counsel to represent bargaining unit employees in lawsuits to using in-house counsel to represent bargaining unit employees. Representation in legal proceedings was not a mandatory subject of bargaining.

The employer did not refuse to bargain when in-house counsel provided a bargaining unit employee with a legal representation agreement to be signed before representation began. The use of the legal representation agreement was not a mandatory subject of bargaining.

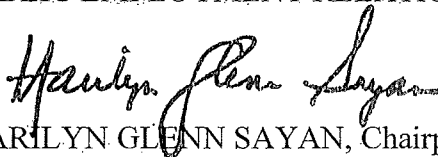
NOW, THEREFORE, it is

ORDERED


The Findings of Fact, Conclusions of Law, and Order issued by Examiner Emily H. Martin are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 5th day of September, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in cursive script, appearing to read "Marilyn Glenn Sayan".

MARILYN GLENN SAYAN, Chairperson

A handwritten signature in cursive script, appearing to read "Pamela G. Bradburn".

PAMELA G. BRADBURN, Commissioner

A handwritten signature in cursive script, appearing to read "Thomas W. McLane".

THOMAS W. McLANE, Commissioner



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PUBLIC EMPLOYMENT RELATIONS
COMMISSION

BY: */s/ Diane Thovsen*
DIANE THOVSEN

CASE NUMBER: 24026-U-11-06144

FILED: 06/03/2011

FILED BY: PARTY 2

DISPUTE: ER UNILATERAL

BAR UNIT: LAW ENFORCE

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